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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR
THE ENVIRONMENT, *et al.*,
Respondents.

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES AND NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITION

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INTEREST OF AMICUS CURIAE NATIONAL COUNCIL OF FARMER COOPERATIVES AND NATIONAL CATTLEMEN'S ASSOCIATION

The National Council of Farmer Cooperatives (hereinafter referred to as "NCFC") is a nationwide association of cooperative businesses owned and controlled by farmers. Its membership includes nearly 100 major marketing and farm supply cooperatives, the banks of the Farm Credit System, and 31 state councils of farmer cooperatives.

NCFC's members handle practically every type of agricultural commodity produced in the United States. They market

these commodities domestically and around the world, and furnish supplies and credit to their farmer members and patrons. NCFC represents about 90% of the nearly 4,300 local farmer cooperatives throughout the nation. Those cooperatives have a combined membership of nearly 2,000,000 farmers and ranchers.

Cooperatives supply about 40 percent of the production inputs, including plant nutrients and crop protection products, used on farms in the U.S. Over three-fourths of the milk produced by America's dairy farmers is processed and marketed through farmer-owned cooperatives. Southview Farm is a member of Agway, Inc., a regional farm supply cooperative, and of Dairylea Cooperative, Inc., a dairy cooperative. Agway is a member of NCFC.

The National Cattlemen's Association (hereinafter referred to as "NCA") is the national spokesman for all segments of the nation's beef cattle industry. NCA represents 230,000 cattle producers nationwide through 46 state cattlemen's and 28 national breed associations. NCA's mission is to advance the economic, political, and social interests of the U.S. cattle industry.

Agriculture is the nation's largest industry. The beef cattle business, accounting for approximately 22% of all agricultural marketings and 44% of all livestock and poultry marketing (both based on total annual cash receipts), is the largest segment of American agriculture.

The interest of NCFC/NCA in this case is to urge the Court to review the Second Circuit's decision in light of the intent of Congress in enacting the Clean Water Act (hereinafter referred to as "CWA"). 33 U.S.C 1251 *et seq*. The farmer-owners of NCFC member cooperatives and the members of NCA could face adverse legal and economic consequences if the Second Circuit's decision is allowed to stand. Everyday farming activities such as the application of fertilizers and pesticides, and soil

disturbing activities including tilling, planting and cultivating may be considered point source discharges as a result of the lower court's holding in this case. This could subject virtually every farmer in the United States to the CWA's restrictive regulation and permit requirements, as well as citizen suits, and create a regulatory morass for state and federal regulators.

SUMMARY OF ARGUMENT

The primary purpose of this submission is to support the petition for writ of certiorari by outlining the practical ramifications of the Second Circuit's decision. NCFC/NCA agree with the petitioners' contention that the Second Circuit went beyond Congressional intent in interpreting the CWA, especially with regard to (1) the "agricultural stormwater exemption," and (2) the definition of manure spreaders and "swales" in crop fields as point sources. 33 U.S.C.§ 1362(14).

By its very nature, farming involves the purposeful disturbance of land and the application of crop nutrient and protection products. Congress took this into account in the CWA by distinguishing between point source discharges and nonpoint source run-off from agricultural land. The Second Circuit's decision blurs this statutory distinction and could render meaningless the CWA's nonpoint source agricultural provisions in Section 319. 33 U.S.C. 1329. The lower court's holding could threaten the economic viability of every farmer and rancher in the United States by subjecting them to the restrictions of the CWA's point source regulations and citizen suit provisions. In addition, the Second Circuit's holding would significantly increase the responsibilities of state regulators.

ARGUMENT

I. CONGRESS RECOGNIZED AND PROVIDED FOR THE UNIQUE NATURE OF AGRICULTURE IN THE CWA.

A. The Special Treatment Of Agriculture In The CWA Is Necessary And Appropriate.

Agriculture involves the purposeful disturbance of land surfaces and the application of crop nutrients and protection products to augment and enhance natural processes in the production of food and fiber. Society has enjoyed the benefits of American agriculture's bountiful harvest in the form of an uninterrupted supply of high quality and affordable food and fiber.

Regardless of their best efforts, farmers and ranchers can not completely control runoff from their land caused by rainfall. Consequently, runoff may transport soil, pesticides, and nutrients (including animal manures and crop residues) into waters under the jurisdiction of the CWA. Because of the influence of natural forces, effective nonpoint source management involves the daily decisions of nearly two million farmers and ranchers on a site-specific basis. In fact, it is typically very difficult to trace nonpoint source runoff to its origins by the time it enters waterways protected by the CWA. There are simply too many variables involved in agriculture to regulate it in a manner similar to discharges from manufacturing operations and other point source activities.

B. The CWA Takes Into Account The Unique Nature Of Agricultural Production By Distinguishing Between Point Source Discharges And Nonpoint Source Runoff.

Congress accommodated the unique nature of agricultural production in the CWA by distinguishing between point source

discharges and nonpoint source runoff. The CWA contains distinct provisions for each category of pollution.

Point sources, with measurable discharges through readily identifiable pipes or other conveyances, are highly regulated through Section 301 of the National Pollution Discharge Elimination System (hereinafter referred to as "NPDES") permits and enforcement mechanisms, including citizen suits. 33 U.S.C. 1342.

Congress further acted to differentiate among nonpoint source activities in the CWA by:

> Establishing voluntary nonpoint source management programs under Section 319, in which States take the lead in determining appropriate programs for managing categories of nonpoint sources, including agricultural land activities. 33 U.S.C. 1329;
>
> Requiring permits for municipal and industrial stormwater runoff from parking lots and the like in Section 402. 33 U.S.C. 1342.; and
>
> Clarifying the authority of States to manage agricultural land activities under Section 319, by specifically exempting "agricultural stormwater" discharges from the point source provisions of the CWA.
> *Id.*

Under Section 319, Congress allows States to determine how best to work with farmers and ranchers to manage nonpoint source runoff. States have generally focused efforts where waters are deemed by the State to not comply with designated uses. Progress by farmers and ranchers is judged by their participation in implementation of best management practices that are intended to reduce runoff, not by the actual levels of runoff. Significantly, Section 319 does not provide for citizen suits. 33 U.S.C. 1329.

II. THE SECOND CIRCUIT'S DECISION BLURS THE STATUTORY DISTINCTION BETWEEN POINT SOURCE DISCHARGE AND NONPOINT SOURCE RUNOFF.

A. The CWA Establishes Separate Regulatory Regimes For Agricultural Land Application And Concentrated Animal Feeding Manure Storage Facilities.

Before the Second Circuit's decision, only one agricultural production activity, concentrated animal feeding operations (hereinafter referred to as "CAFO"), was subject to the point source regulatory regime and citizen suits. 33 U.S.C. 1362(14). CAFO's are held to a higher standard than other point sources. The NPDES permits for most point sources include allowable legal discharges of pollutants into navigable waters. In contrast, CAFO's are permitted no discharge from animal manure lagoons or other storage structures, except in the event of a 25-year, 24-hour storm.

In its last minute amicus to the Second Circuit, the U.S. Department of Justice (hereinafter referred to as "DOJ") argued that Southview Farm's confinement operation constituted a CAFO. DOJ further argued that subsequent land application of manure constituted a discharge from the CAFO.

Whether Southview Farms should be regulated as a CAFO misses the point. Even if Southview Farms was a CAFO, this case does not involve a discharge from a manure lagoon, a fact that was clearly established in the District Court. This case involves runoff from manure land application. Prior to the Second Circuit's decision, land application of manure was not subject to the point source permitting requirements of CAFO's. Instead, it was managed as a nonpoint source activity under Section 319. 33 U.S.C. 1329. Congress intended runoff from manure spreading and other types of land application to be

considered as nonpoint sourced and intended the strict point source regulation of CAFO's to be narrowly applied.

B. The Lower Court's Decision Could Render Section 319 Of The CWA Meaningless.

The Second Circuit's determination that manure spreaders and field swales constitute point sources is contrary to the tradition of managing agricultural activities under the nonpoint source provisions of Section 319 and could render that provision meaningless. 33 U.S.C. 1329. Under the Second Circuit's reasoning it would appear that each of the following major farming practices could also be considered point source activities:

Application of agricultural inputs, such as plant nutrients and pesticides;

Land application of treated municipal sewage sludge; and

Potentially any soil disturbing activity (tillage, cultivation, planting, etc.).

Like the case before the Court, each of these examples involves the use of machinery or conveyance to spread concentrated materials on the land or making the land more susceptible to runoff in the event of rainfall. Further, of the more than 300 million acres of cropland and 635 million acres of pasture and rangeland, there are literally millions of "swales," or low spots that could be deemed by a court to be point sources. Few farms or ranches are so level there are no "swales."

III. SUBJECTING AGRICULTURAL LAND APPLICATION TO POINT SOURCE PERMITTING AND CITIZEN SUITS WOULD RESULT IN A REGULATORY AND LEGAL MORASS FOR FARMERS AND RANCHERS AS WELL AS THE GOVERNMENT.

Every farm in the U.S. regularly engages in one or more of the above practices which could be considered point source activities if the Second Circuit's decision is allowed to stand. Practically, this means every farm and ranch in the U.S. could be subject to point source regulations and citizen suits for their farming and ranching activities.

Additionally, private citizens may use the Second Circuit's decision to bring citizen suits against farmers and ranchers. This is arguably the most egregious manifestation of the Second Circuit's holding. A farmer using the best management practices available to control runoff could be subject to citizen suits. Even if the farmer won such a suit, the cost of litigation could be devastating.

Even the U.S. Environmental Protection Agency (hereinafter referred to as "EPA") disagrees with the Second Circuit's ruling that land application equipment constitutes a point source. EPA has indicated that the federal government does not intend to require NPDES permits for manure spreaders. However, it is States who are responsible for most permitting programs and must struggle with how to comply with the Second Circuit decision.

As a prime example of unintended consequences of the lower court's decision, the U.S. Department of Agriculture has policies and programs to encourage farmers and ranchers to manage animal manure as a nutrient and soil building resource, instead of as a waste product. EPA is also actively encouraging farmers to use municipal sewage sludge as a nutrient, thereby helping to alleviate a growing waste problem. These efforts will

be thwarted if farmers and ranchers become more vulnerable to CWA citizen suits.

CONCLUSION

The petition for a writ of certiorari should be granted. This case should be reviewed in light of the intent of Congress in enacting the CWA. The decision of the Second Circuit should be reversed.

Respectfully Submitted,

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